

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1929

No. 5079

JACOB SPUND, APPELLANT

vs.

CAFRITZ CONSTRUCTION COMPANY,
A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED OCTOBER 23, 1929.

PRINTED DECEMBER 19, 1929.

M-R-9

Mar 11, 1931

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Court of Appeals of the District of Columbia

No. 5079.

JACOB SPUND, Appellant,

vs.

CAFRTZ CONSTRUCTION COMPANY, a Corporation

a Supreme Court of the District of Columbia.

At Law.

No. 73024.

CAFRTZ CONSTRUCTION COMPANY, a Corporation, Plaintiff,

vs.

JACOB SPUND, Defendant.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1

Declaration.

Filed April 4, 1927.

In the Supreme Court of the District of Columbia.

At Law.

No. 73024.

CAFRTZ CONSTRUCTION COMPANY, a Corporation, Plaintiff,

vs.

JACOB SPUND, Defendant.

First Count.

The plaintiff, Cafritz Construction Company, a corporation, sues the defendant, Jacob Spund, for that heretofore

said plaintiff was and still is a licensed real estate broker in the District of Columbia, and as such real estate broker negotiated a sale of premises known as 5107-5109 Connecticut Avenue, Northwest, to the defendant Jacob Spund, at and for the sum of Thirty-seven Thousand Five Hundred Dollars (\$37,500), which said price was thereafter adjusted between the said defendant and the former owner of said premises to \$30,500. That before, at and after the sale aforesaid said defendant did undertake, promise and agree with the plaintiff, acting by and through its representatives and agents, to pay to the plaintiff the usual real estate broker's commission in the District of Columbia, to wit, the sum of five per cent of said purchase price of \$30,500. That demand therefor has been duly made but the said defendant has wholly failed and refused to pay the same. That the whole thereof is now justly due and owing and unpaid.

Wherefore the plaintiff sues the defendant and claims the sum of Fifteen Hundred Twenty-five Dollars (\$1,525) with interest thereon from the first day of December, 2 1925, besides costs.

Second Count.

The plaintiff, Cafritz Construction Company, a corporation, sues the defendant Jacob Spund, for money payable by the defendant to the plaintiff for services rendered by the plaintiff for the defendant at his special instance and request in connection with and growing out of the sale to the defendant of premises 5107-5109 Connecticut Avenue, Northwest, in the City of Washington, District of Columbia. That the fair and reasonable value of said services is Fifteen Hundred Twenty-five Dollars (\$1,525); that although said defendant has promised and agreed to pay the same, he has wholly failed and refused so to do; that the whole thereof is now justly due and owing by the defendant to the plaintiff.

Wherefore the plaintiff sues the defendant and claims the sum of Fifteen Hundred Twenty-five Dollars (\$1,525) with interest from December 1, 1925, besides costs.

LOUIS OTTENBERG,
Attorney for Plaintiff.

Bill of Particulars.

* * * * *

To Services Rendered by the plaintiff to the defendant in connection with the purchase by the defendant of premises 5107-09 Connecticut Avenue, Northwest, in the City of Washington, District of Columbia \$1,525.00

with interest from December 1, 1925, besides costs.

3 *Affidavit of Merit.*

* * * * *

DISTRICT OF COLUMBIA, ss:

Personally appeared Garfield A. Kass, who, being first duly sworn, on oath says that, for the purposes hereof, he is the agent of the plaintiff, the Cafritz Construction Company, a corporation, and makes this affidavit for and on behalf of the plaintiff, and has knowledge of the facts.

That he negotiated the sale to the defendant of premises 5107-5109 Connecticut Avenue, Northwest, in the City of Washington, District of Columbia, at and for the sum of Thirty-seven Thousand Five Hundred Dollars, which said price was thereafter reduced by agreement of the parties to Thirty Thousand Five Hundred Dollars, and that the said defendant did undertake and promise to pay to the plaintiff the usual brokerage commission, to wit, the sum of five per cent of the purchase price aforesaid; that the services rendered by the plaintiff to and for the defendant in the purchase of said premises are reasonably worth the sum of Fifteen Hundred Twenty-five Dollars (\$1,525), and said defendant did undertake, promise and agree to pay the plaintiff the said sum; that demand has been duly made therefor, and that said defendant has wholly failed and refused to pay the same; that the whole thereof is now justly due and owing, and that the said plaintiff has a just right to recover from the defendant the sum of Fifteen Hundred Twenty-five Dollars, with interest from December 1, 1925, exclusive of all set-offs and just grounds of defense, besides costs.

GARFIELD I. KASS.

Subscribed and sworn to before me this 1st day of April, 1927.

[SEAL.]

D. FULTON HARRIS,
Notary Public, D. C.

4

Defendant's Plea.

Filed April 26, 1927.

* * * * *

First Plea.

The defendant, Jacob Spund, for plea to the first count of the plaintiff's declaration, says, that he has no independent knowledge about the plaintiff being a licensed real estate broker, except general reputation, and denies that he had such knowledge before, at or after his purchase of premises known as 5107-5109 Connecticut Avenue, Northwest for the sum of Thirty Thousand, Five Hundred (\$30,500.00) Dollars as alleged.

That defendant entered into a contract in writing for the purchase of said houses, dated December 1, 1925, which by reason of credit given in said contract made the purchase price Thirty Thousand, Five Hundred (\$30,500.00) Dollars. The defendant denies that before, at or after the said sale he undertook, promised and agreed with the plaintiff, acting by and through its representatives and agents, to pay to the plaintiff or any one else, the usual real estate broker's commission in the District of Columbia, to wit: The sum of five per cent of said purchase price of Thirty Thousand, Five Hundred (\$30,500.00) Dollars, or any other sum.

On the contrary, defendant states that he negotiated personally for the purchase of said property with one, Fred Schnider, of the Kay-Schnider-Kay Company, owner of said properties, and by said contract in writing for his purchase of said land and premises, one, Garfield I. Kass, who made the affidavit of merit attached to the declaration, signed said contract of sale and acted therein as agent for the owner, the Kay-Schnider-Kay Company.

5

That by the terms of said contract in the event of a failure to perform on the part of defendant, it was

agreed that the deposit of Thirty-five Hundred (\$3,500.00) Dollars was to be forfeited, and if forfeited was to be retained by Kay-Schnider-Kay, Inc. as compensation for services rendered, but forfeiture of deposit did not relieve defendant of responsibility to comply with the terms of sale.

That defendant made full settlement of the purchase price and fully performed said contract with the Kay-Schnider-Kay Company, owner, and that defendant made no promises to the plaintiff or any of its officers and agents, or the said Garfield I. Kass, for the payment of any commission whatsoever, on account of his said purchase. By reason of the premises defendant says that he is not indebted unto the plaintiff in the sum of Fifteen Hundred and Twenty-five (\$1,525.00) Dollars, with interest as claimed in the first count of the plaintiff's declaration, or in any other sum.

Second Plea.

The defendant, Jacob Spund, for plea to the second count of the plaintiff's declaration, says, that he is not indebted to the plaintiff for services rendered by the plaintiff for the defendant at defendant's special instance and request, in connection with and growing out of the sale to the defendant of premises 5107-5109 Connecticut Avenue, Northwest, in the City of Washington, District of Columbia, and defendant states that he did not engage the plaintiff through its duly authorized officers and agents or any other person, particularly the said Garfield I. Kass, to render any service to him in connection with his said purchase of said

6 property. Further, this defendant denies that he promised and agreed to pay the plaintiff the said sum of Fifteen Hundred and Twenty-five (\$1,525.00) Dollars, or any part thereof, as therein in the second count is set forth, and herein as a further plea to said second count alleges the true facts with regard to his purchase of said premises 5107-5109 Connecticut Avenue, Northwest, Washington, District of Columbia, to be as fully set out in defendant's first plea, which he reiterates as to the second count.

Wherefore, by reason of the premises, this defendant denies that he is indebted unto the plaintiff in the sum of Fifteen Hundred and Twenty-five (\$1,525.00) Dollars, with in-

terest, as claimed in said second count, or in any other sum.

CHARLES LINKINS,
204 McGill Bldg., Attorney for Defendant.

Affidavit of Defense.

* * * * *

Personally appeared, Jacob Spund, who being first duly sworn on oath, says, that he is the defendant named in the above entitled cause of action wherein the Cafritz Construction Company, a corporation, is plaintiff, and that defendant has knowledge of the facts as hereinafter set forth.

That the defendant denies that he engaged the plaintiff or any officer or agent of the plaintiff or one, Garfield I. Kass, hereinafter referred to, to negotiate the purchase of premises 5107-5109 Connecticut Avenue, Northwest, in the

City of Washington, District of Columbia. Defendant states that on December 1, 1925 he entered into a written contract for the purchase of said premises, a true copy of which is hereto attached and made part of this affidavit. That the defendant had all of his negotiations relative to the purchase of said land and premises with one, Fred Schnider, an officer or agent of the Kay-Schnider-Kay Company, a corporation, the owner of said premises. As shown by said written contract, one, Garfield I. Kass, who has made the affidavit of merit, filed with the declaration in this case, represented and signed himself as the agent for the owner of said land and premises; that this defendant, in accordance with the terms of said contract, made settlement in full for the purchase of said premises with the said Fred Schnider, an officer or agent of said Kay-Schnider-Kay Company, and that this defendant made no promise or agreement with the plaintiff, or any of its officers or agents or with the said Garfield I. Kass, to pay any commission, fee or money or thing to plaintiff or any of its officers or agents or the said Garfield I. Kass, on account of the purchase of said property by defendant, for the sum of Thirty Thousand, Five Hundred (\$30,500.00) Dollars, as alleged.

This defendant, therefore, denies that he promised to pay the plaintiff or any of its officers or agents or the said

Garfield I. Kass the sum of Fifteen Hundred and Twenty-five (\$1,525.00) Dollars or any other sum as commission or fee on account of his purchase of said land and premises.

This defendant, therefore, denies that he is indebted unto the plaintiff in the sum of Fifteen Hundred and Twenty-five (\$1,525.00) Dollars, with interest thereon from December 1, 1925, or any other sum.

JACOB SPUND.

8 Subscribed and sworn to before me this 21st day
of April, 1927.

[SEAL.]

LUTHER W. LINKINS,
Notary Public, D. C.

Builders of "Homes of Comfort,"

Kay-Schnider-Kay Co., Inc., Investment Building, 15th and
K Streets N. W., Washington, D. C.

Phones: Franklin 513-514.

Sales—Rents—Loans—Insurance.

[\$500.00.]*

\$3,500.—.

Washington, D. C., 12/1/1925.

Received of Jacob Spund a deposit of Three thousand Five Hundred Dollars, to be applied as a part payment in the purchase of premises, Lots 47 & 48 in Square 1989, together with the improvements thereon, known as No. 5107-5109 Connecticut Avenue, District of Columbia, on the following terms of sale, to-wit:

Price of property thirty-seven thousand Five Hundred Dollars (\$37,500.—), the purchaser agreeing to pay Twenty Thousand five Hundred Dollars (\$20,500.—) cash at the date of conveyance, of which sum this deposit shall be a part.

The purchaser is to assume, give, place, or take title subject to a first deed of trust secured on said premises of \$8,500.— due abt. 2½ yrs. with interest at the rate of

[*Erased in copy.]

6½ per cent per annum, payable semi-annually—on each house.

These two Houses having 55' front

Title to be good of record and free of encumbrance except as aforesaid; otherwise deposit will be returned to purchaser; but should the title upon examination prove defective, the seller shall not be liable for any damages caused thereby other than the cost of examination of title, nor shall the Agent be liable for any cost or damages whatever. Provided, however, that if upon examination, the title should be found defective, the seller shall have the right at his expense to promptly remove the defect, and the time herein specified for full settlement shall thereby be extended for the period necessary for such prompt legal action.

Examination of title, conveyancing, notarial charges and recording at the cost of the purchaser.

The seller is to execute the usual special warranty deed and attach necessary revenue stamps.

Taxes, interest, rents, insurance, water rent, etc., to be adjusted to date of transfer.

Special assessments for any work completed prior to date of this contract shall be paid by the seller.

Seller hereby agrees to give possession of property at time of settlement.

This sale is made subject to the existing tenancy of the present occupant of the premises, and of any restrictive covenants of record.

Purchaser is required and agrees to make full settlement in accordance with above terms of sale within 15 days from date of acceptance by owner, as indicated thereon; otherwise the deposit will be forfeited, it being agreed that said deposit, if forfeited, shall be retained by Kay-Schnider-Kay Co. Inc., as compensation for services rendered, but forfeiture of deposit shall not relieve purchaser of responsibility to comply with the within terms of sale. Two car garage to match brick of house, concrete flooring, tin roof. Same to be on each house. (6) Line Stone Bases—Houses to be completed prior to settlement, also Garages. 5107 to be similar to sample. Assessments to be paid for cement alley by Kay-Schnider-Kay Co. Electric Light in Garage.

Credit is hereby given for \$7,000. Balance due \$10,000.00 cash on the above Two Houses #5107-5109 Conn. Ave. The price above is net.

This contract, executed in triplicate, is made subject to the approval of owner, and contains the final and entire agreement between the parties hereto, and shall not be bound by any terms, conditions, or representations not herein recited.

KAY-SCHNIDER-KAY CO., INC.,
(Signed) By GARFIELD I. KASS,
Agents for Owner.

Accepted:

(Signed) JACOB SPUND,
Purchaser.

(Signed) KAY-SCHNIDER-KAY CO.
FRED SCHNIDER,
Owner.

10

Joinder of Issue.

Filed April 28, 1927.

* * * * *

The plaintiff joins issue with the defendant upon the pleas filed herein.

LOUIS OTTENBERG,
Attorney for Plaintiff.

Memorandum.

May 15, 1929.—Verdict for plaintiff for \$1,525.00.

Motion for a New Trial.

Filed May 20, 1929.

* * * * *

Now comes the defendant, Jacob Spund, by his attorneys of record, Linkins, Linkins and Boyd, and moves the Court to grant a new trial of the above entitled cause upon the following grounds:

1. The verdict of the jury was contrary to the evidence.
2. The verdict of the jury was contrary to the weight of the evidence.

3. The Court erred in instructing the jury.

4. The Court erred in instructing the jury as to the law of the case.

5. The Court erred in the admission of evidence, excepted to by the defendant at the time, that it could find that an oral contract was entered into between the Plaintiff and defendant for a commission of 5%, when the con-
11 tract for the purchase of the houses was in writing, was offered in evidence and was signed by Garfield I. Kass as agent for owners.

6. The Court erred in denying defendant's prayers numbers 1, 2, 3, 4, 5, 7, 8 and 9, to which defendant duly excepted at the time.

7. The Court erred in instructing the jury that it could, if it found for the plaintiff, return a verdict of \$1,525.00, with or without interest as it saw fit, to which instruction of the Court, defendant duly excepted at the time.

8. The Court erred in granting leave to the Plaintiff, after the case was closed, to produce a witness, Fred Schnider, who had already testified in the case and to permit him to testify that the Kay-Schnider-Kay Company had paid a full commission of 5% to Douglass and Phillips, defendant not having time to investigate such transaction and such transaction not having weight as evidence in this case under the view of the Court that the jury, in order to find for the Plaintiff, would have to find a separate oral contract between Plaintiff and Defendant to pay it a 5% commission on the purchase price of \$30,500.00. This ground is supported by the affidavit of Jesse Nussier, hereto attached and made part hereof.

LINKINS, LINKINS AND BOYD,
By CHAS. LINKINS,
Member of Firm,
Attorneys for Defendant.

To Mr. Louis Ottenberg,
Attorney for Plaintiff,
Wilkins Bldg., Wash., D. C.

DEAR SIR:

Please take notice that the foregoing Motion for a New Trial, and supporting affidavit, will be on for hearing before the Justice of the Supreme Court of the District of

Columbia, holding Circuit Court, Division No. 2, or before the Justice to whom the same may be assigned for hearing, on Friday, May 24, 1929, at 10 o'clock A. M.,
12 or as soon thereafter as counsel can be heard.

LINKINS, LINKINS AND BOYD,
By CHAS. LINKINS,
Member of Firm,
Attorneys for Defendant.

Copy of foregoing Motion for New Trial and Supporting Affidavit acknowledged this 20th day of May, A. D. 1929.

LOUIS OTTENBERG,
By LEO SCHLOSBERG,
Attorney for Plaintiff.

Affidavit in Support of Motion for New Trial.

* * * * *

DISTRICT OF COLUMBIA, To wit:

Jesse Nussear, after being duly sworn according to law, upon oath does depose and say that he is the settlement Clerk of the National Mortgage and Investment Corporation, with offices in the Denrike Building, Washington, D C.

That deponent was in charge of settlements of sales of real estate in the office of Douglass and Phillips during the years 1926 and 1927 and has personal knowledge of the matters and things set forth in this affidavit.

That the office of Douglass and Phillips made a deal for the Kay-Schnider-Kay Company on premises 5119 and 5121 Conn. Avenue N. W., Washington, D. C., which properties belonged to said corporation. That at the request of Mr. Charles Linkins, Attorney-at-law, deponent went over all the original papers having to do with said transaction, which was a trade, said original papers now being in the offices of J. E. Douglass Company, 1621 K Street N W., Washington, D. C. That one of the original contracts having to do with the transaction regarding said two houses is in the said latter named offices and according to its terms Douglass and Phillips were to receive \$965.00 from the Kay-Schnider-Kay Company as commis-

sions to them. That after carefully going over the papers and books of original entry and ledger of said Douglass and Phillips deponent states that by arrangement between Mr. Phillips of said firm and the Kay-Schnider-Kay Co., said commission was reduced to \$750.00, which latter sum was paid.

Deponent says that he is unable to figure the exact percentage said \$750.00 was, owing to the fact that the settlement was made personally by Mr. Fred Schnider, though deponent says that the commission paid said Douglass and Phillips was less than $2\frac{1}{2}\%$.

JESSE NUSSEAR.

13 Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 20th day of May, A. D. 1929.

[SEAL.]

ERNEST E. HUYETT,
Notary Public, District of Columbia.

Supreme Court of the District of Columbia.

Friday, May 24th, 1929.

Session resumed pursuant to adjournment, Hon. William Hitz, Justice, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record and thereupon comes on for hearing the motion for a new trial filed herein and the same is thereupon argued and submitted to the court; upon consideration thereof, it is ordered that the same be and it is, hereby overruled and judgment on the verdict is ordered.

Wherefore it is considered that plaintiff recover of defendant herein, the sum of Fifteen Hundred and Twenty-five Dollars (\$1,525.00), with interest thereon from this date, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment, the defendant by his attorney of record, in open court, notes an appeal to the Court of Appeals; whereupon, the maximum of an undertaking to operate as a supersedeas is hereby fixed in the sum of Two Thousand Dollars, or for costs only in the

sum of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars with the the clerk in lieu thereof.

14

Memoranda.

June 18, 1929.—Supersedeas undertaking, \$2,000, approved and filed. Proposed Bill of Exceptions and notice filed.

Assignments of Errors.

Filed June 18, 1929.

* * * * *

1. The Court erred in permitting testimony to be given by plaintiff's two witnesses that an oral contract was entered into between plaintiff and defendant for the payment of a five per cent commission before the written contract was entered into.

2. The court erred in permitting testimony to be given by the witness, Kass, and by the witness, Schnider, explaining the meaning of the words "The price above is net," as set forth in the written contract, Kass having signed the contract as agent for the owners and Schnider having been the scrivener of the contract.

3. The Court erred in permitting the witness, Schnider, on rebuttal, to testify to the sale of other houses through the office of Douglass & Phillips.

4. The Court erred in refusing Defendant's instruction number 1.

5. The Court erred in refusing Defendant's instruction number 2.

6. The Court erred in refusing Defendant's instruction number 3.

15 7. The Court erred in refusing Defendant's instruction number 4.

8. The Court erred in refusing Defendant's instruction number 5.

9. The Court erred in refusing Defendant's instruction number 7.

10. The Court erred in refusing Defendant's instruction number 8.

11. The Court erred in refusing Defendant's instruction number 9.

12. The Court erred in instructing the jury that it could find for the plaintiff under an oral agreement, if it so sound that such an agreement had been entered into, which alleged oral agreement was entered into before the written agreement was signed.

13. The Court erred in instructing the jury that if it found for the plaintiff it should find for it in the sum of \$1,525.00, "with or without interest as you see fit."

LINKINS, LINKINS & BOYD,
By CHAS. LINKINS,
Member of Firm,
Attorneys for Defendant Spund.

16

Designation of Record.

Filed June 18, 1929.

* * * * *

The Clerk of the Court will include in the transcript of record on appeal in the above entitled cause, the following:

1. Declaration filed in the 4th day of April, A. D. 1927 and the affidavit of merit attached thereto which was offered in evidence.

2. Defendant's pleas filed the 26th day of April, 1927.

3. Joinder of issue, filed April 28th, 1927.

4. Memo.: Verdict for plaintiff for \$1,525.00, without interest.

5. Memo.: Judgment on verdict entered May 24th, 1929.

6. Motion for new trial, together with affidavit in support thereof, filed May 20, 1929.

7. Memo.: May 24th, 1929, Appeal noted in open court and supersedeas bond on appeal fixed at \$2,000.00 or cost bond fixed at \$100.00 or in lieu thereof, a deposit of \$50.00 cash with the Clerk of the Court.

8. Memo.: Supersedeas Bond approved by Court and filed June 18th, 1929.

9. Memo.: Bill of exceptions filed June 18th, 1929.

10. Memo.: Bill of exceptions signed.

11. Assignment of Errors.

12. This designation of record.

CHAS. LINKINS,
Attorney for Defendant.

17 Service of a copy of this Designation of Record acknowledged this 18th day of June, A. D. 1929.

LOUIS OTTENBERG,
Attorney for Plaintiff.

Memoranda.

October 4, 1929.—Order of Court of Appeals extending time to file transcript of record to and including the 24th day of October, 1929.

October 21, 1929.—Defendant's Bill of Exceptions signed in duplicate and filed.

18 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 17, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 73024, at Law, wherein Cafritz Construction Company, a corporation, is Plaintiff and Jacob Spund is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of October, 1929.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,

Clerk.

19 In the Supreme Court of the District of Columbia,
Holding a Circuit Court.

At Law.

No. 73024.

CAFRITZ CONSTRUCTION COMPANY, a Corporation, 14th & K
Streets N. W., Plaintiff,

vs.

JACOB SPUND, 5109 Conn. Ave. N. W., Defendant.

Defendant's Bill of Exceptions.

Filed Oct. 21, 1929.

Be it remembered that this cause came on for trial before Hon. William Hitz, an Associate Justice of the Supreme

Court of the District of Columbia, and a jury empanelled to try the issues herein on the 14th day of May, 1929, and thereafter was proceeded with.

Thereupon and thereafter, the plaintiff, to maintain the issues on its part joined, called — a witness,

Garfield I. Kass, who testified in substance that previous to the 1st day of December, 1925, and thereafter, until recently he was a salesman of real estate in the office of the Cafritz Construction Company; that he was so employed during the months of October, November and December, 1925, and for nine (9) months during the year 1926. That the two properties 5107 and 5109 Connecticut Avenue, N. W., which belonged to the Kay-Schnider Kay Company, a corporation, were listed for sale in the office of the plaintiff. That witness had seen the properties, which comprised two of a row of houses. The witness was here shown two contracts, the one being on white paper and calling for a credit of \$7,000.00, being produced by the defendant, and the other being on blue paper and produced by plaintiff. Both contracts were offered in evidence and

20 photostat copies thereof are made part of the record on appeal. Both contracts were in the handwriting of Mr. Fred Schnider. That there were two large signs in front of the properties set at an angle to each other, so they would be seen to the North and to the South on Connecticut Avenue, N. W. The signs were large ones and the prices, \$18,750.00, \$17,950.00, and the owner's name, Kay-Schnider-Kay Company were in very large letters. That Mr. Harry Spund, brother of the defendant sometime during the month of November, 1925, introduced the defendant to witness at said brother's home and witness showed defendant the houses. That witness showed defendant and his wife the two houses. The row of houses had been on the market for about three months and as the Kay-Schnider-Kay Company needed money, it was desirous of making a first sale to get the sale started. That he showed other houses listed in the plaintiff's office to defendant and that he was to the houses with defendant twice and saw the defendant about four times. That defendant gave witness a verbal offer of \$25,000 for the two houses and he submitted same but it was rejected. That up until the 1st day of December, 1925, the plaintiff was representing the

owner, Kay-Schnider-Kay Company in an effort to sell the houses. That witness made two trips to Mr. Spund's store 21st and Rhode Island Avenue, N. E., the second trip being on the day the contract was signed, December 1, 1925. On that date Mr. Fred Schnider, of the owner company and witness went to Spund's store and conferred with Mr. Spund in the dining room over the store. It was about lunch time and Mrs. Spund was in and out of the room. No contract of any kind had been drawn up at this time. Thereupon the following occurred:

Question by plaintiff's attorneys: Mr. Kass, just what was said by the defendant and Mr. Schnider about the question of the payment of commission if any, to the plaintiff, on that occasion?

To which question the defendant, through his counsel, objected on the grounds that the contract, signed
21 afterwards, was in writing; had been offered in evidence by plaintiff and all verbal negotiations were merged in the written contract; that the contract was not entered into by the plaintiff, but that the principal signature thereto was made by the witness Garfield I. Kass, individually and as agent for owner. But the Court overruled said objection of counsel for defendant, to which action of the Court in overruling said objection counsel for defendant duly excepted, which exception was duly noted by the Court.

To which question of plaintiff's counsel the witness testified that Mr. Spund stated that schneider had offered the two houses to him for \$32,500.00. He then offered \$30,500.00 provided Kay-Schnider-Kay Company would build the two garages in the rear of the two houses and make certain other minor changes. Mr. Schnider then said that he would not accept \$30,500.00, build the two garages, make the minor charges and pay the real estate broker's commission. Thereupon Mr. Spund said he would take care of the commission; that in agreeing to accept \$30,500.00 the defendant agreed with Mr. Schnider that he would stand for a five (5%) per cent commission. The witness further testified that immediately after the conference, the witness, Mr. Fred Schnider, and Mr. and Mrs. Spund went to the office of the Kay-Schnider-Kay Company, where there was quite some discussion as to other terms of the contract, and after a conference with Mr. Kay, of the owner company, the four persons went into Mr. Fred

Schnider's office, where Mr. Fred Schnider drew up contracts.

Thereupon the following occurred:

Question by plaintiff's counsel:

Q. Mr. Kass, please state, what if anything was said about the meaning of the words "The price above is net," as used in the contracts?

To which question counsel for the defendant objected on the grounds that the contracts being in writing spoke for themselves and as they were in the handwriting of Mr. Fred Schnider, of the owner company, they should, as a matter of law be construed most strictly against the owner
22 of the properties. But the Court overruled said objection of counsel for the defendant, to which action of the Court in overruling said objection counsel for defendant duly excepted, which exception was duly noted by the Court. To said question the witness testified that Mr. Schnider had said that owing to the credit of \$7,000.00 given the defendant on the purchase of \$37,500.00 and the other improvements to be made by the owner, Mr. Schnider had insisted upon the contracts being made on a net basis to the owner. That the contract when completed on the forms of Kay-Schnider-Kay Company, was read over to Mr. and Mrs. Spund, whereupon witness signed his name to both copies, Mr. Spund and Mr. Schnider, owner for the Kay-Schnider-Kay Company, signed, accepting the contracts as the purchaser and owner respectively. That Mr. Spund gave a deposit by check for \$3,500.00 to the Kay-Schnider-Kay Company and that the plaintiff and witness never received any part of said deposit. That witness was not present at the Title Company when sale was settled, and was not notified of date of settlement. That he learned that settlement had been made at the District Title Company some several days after the date of settlement and immediately went to Mr. Spund's place of business and demanded the commission due. That no one else was there byt witness and Mr. Spund and Mr. Spund made out a check for \$500.00 and offered same to witness but he refused it.

Cross-examination:

On cross-examination witness testified that he had known Mr. Fred Schnider for about four or five years; that they had been salesmen in the office of the Cafritz Construction Company for several years, before Mr. Schnider left to form a corporation with Mr. Kay. The attention of the witness was directed to the affidavit of merit filed with *hte* declaration, he identified the same and stated that he swore to it and said affidavit was offered in evidence by counsel for defendant. Witness further testified that he was not present at Title Company when sale was closed, as
23 the garage had to be built and he knew there had been a delay of some kind; that it was two or three days after the settlement when he learned the settlement had been made and that he immediately went to Mr. Spunds and demanded the 5% commission; that that was the occasion of Mr. Spund tendering a check to witness for \$500.00. Witness being further shown the two signed agreements testified that he struck out the words, "Kay-Schnider-Kay Company" from the principal signature to the forms, at the time he signed them in his own name.

Thereupon, to further maintain the issues on its part joined, the plaintiff produced as a witness

Fred Schnider, who testified in substance that during the year 1925, he was Treasurer of the Kay-Schnider-Kay Company which company built 15 houses in the 5100 block Connecticut Avenue, N. W. That they were put on sale in October, 1925 and that his company had sold none prior to the Spund sale. There were two big signs on property joined together at one end so they showed up and down Connecticut Avenue. They were very big signs and the prices of the houses \$18,750.00 and \$17,950.00, the name of Kay-Schnider-Kay Company were in large figures and letters, about 12 to 14 inches high. The houses were listed with other brokers and that his corporation was engaged in a general real estate business. That on one Sunday before December 1, 1925, Mr. Kass brought Mr. Spund and his wife to the houses. Mr. Spund's brother may have been along, but witness did not remember as to that. Mr. Spund and his wife come once or twice thereafter and later on they come again with Mr. Kass. That his corporation had

the row of houses listed with the Cafritz Construction Company for sale. That Mr. Spund discussed price with witness and offered a very small price. That the witness and Mr. Kass went to Mr. Spund's house on two occasions, the second time being on the day the contract was signed. The conference was held in the dining room and Mr. Spund's wife came in and out. Thereupon the following occurred, witness being examined by plaintiff's counsel.

24 Q. What then was said, if anything about the commissions?

To which question the defendant's counsel objected on the grounds that the contract, which was entered into thereafter spoke for itself and that all prior verbal negotiations merged in the same. But the Court overruled the said objection, to which action of the Court in overruling said objection, counsel for the defendant duly excepted, which exception was duly noted by the Court.

Thereupon and to said question the witness testified that Mr. Spund agreed to pay the 5% commission to the plaintiff. Mr. Spund stated that Schnider had offered the two houses for \$32,500.00. He then offered \$30,500 for the two houses, provided Kay-Schnider-Kay Company would build two garages in the rear of the properties and make certain other minor changes. Mr. Schnider then said that he would not accept \$30,500.00, build the garages, make the minor changes and also pay the Real Estate Broker's Commission. Thereupon Mr. Spund said that he would take care of the commission. That going down to witness's office from Mr. Spund's house, Mr. Kass kept pressing the witness to close the deal on Spund's terms. That before leaving the Spund home Mrs. Spund got a check out of the check book and took it along with her. Mr. Spund, Mrs. Spund, Mr. Kass and the witness went to the office of Kay-Schnider-Kay Company, where after a conference with Mr. Kay, the witness took Mr. and Mrs. Spund and Mr. Kass in his office and wrote the contract and read them over to Mr. and Mrs. Spund. Before the contract was signed he had an understanding with Mr. Spund that Spund would pay the commission. That the check for \$3,500.00 was made payable to the Kay-Schnider-Kay Company, but none of the deposit money went to Mr. Kass. That settlement was made in the office of The District Title Insurance Company on January

28, 1926 and settlement was made on a basis of \$30,500.00; as the purchase price. There were present at the Title Company, other than the settlement clerk, Mr. Spund, Mr. George R. Linkins, representing Mr. Spund, and the witness. That no commissions were held out in the settlement.

That witness notified Mr. Kass of the Settlement a
25 day or two afterwards.

On cross-examination the witness testified that he had known the witness Kass for about eight (8) years; when they were both salesmen in the office of the plaintiff and that witness left the employ of Cafritz construction company in 1924. That Mr. Kass had been representing the owner in the transactions with Mr. Spund up to the 1st day of December, 1925. That on one occasion the witness had offered the houses to Mr. Spund for \$33,000.00 and later on for \$32,000.00.

This is the substance of all the testimony offered in chief by the plaintiff.

Thereupon defendant's counsel moved the Court, on all the plaintiff's evidence, to instruct the jury to return a verdict for the defendant on the grounds that the written contract was signed by Garfield I. Kass, individually, that the plaintiff was not a party thereto; that the words "The price above is net" should be construed strictly against the owner of the property, its Treasurer having been the scrivener thereof, and Kass individually having signed the same as agent for the owner. But the Court overruled defendant's said motion, to which action of the Court in overruling said motion counsel for defendant excepted, which exception was duly noted by the Court.

Thereupon the defendant, to maintain the issues on his part joined, called as a witness the defendant,

Jacob Spund, who testified in substance that on a Sunday during the early part of November, 1925, while out riding with his wife, niece and children, he saw the signs on the houses, stopped and with his wife and niece went through 5109 Connecticut Ave., N. W., which had been practically completed. On that occasion he saw a man reading a newspaper in the dining room, whom he presumed was a salesman for the owner, but spoke to no one about the houses. That the following Tuesday or Wednesday witness and his

wife again visited the houses, met the witness, Fred
26 Schnider, and witness talked with him about the
houses and got a price from him. That the next day
afterwards, Mr. Fred Schnider came to defendant's store
and offered the two houses for \$33,000.00. That witness,
wife and niece visited the houses again the following Sun-
day and witness was on that occasion quoted a price of \$32,-
000.00. That on the visit to the houses the second Sunday,
and previous to that visit, the same day, witness went to
his brother's home and was introduced to Mr. Kass, by
witness' brother, whom he met then for the first time. That
Mr. Kass spoke about selling witness some houses and in-
cidentally mentioned the Kay-Schnider-Kay houses to wit-
ness. That witness then told Mr. Kass he had already been
dealing with Mr. Fred Schnider on those houses; but would
be glad to look at any others witness had for sale. That Mr.
Kass then took witness, wife and niece, to look at a number
of houses he had listed. That no- liking any of those houses
and the hour being late afternoon, Mr. Kass left witness
and family, stating he was going home for dinner. Witness
and family then went to the Connecticut Avenue houses
again, and witness then discussed price with Mr. Schnider,
who then quoted \$32,000.00 on 5107 and 5109 Connecticut
Ave. About a half hour after witness and family had been
at the houses Mr. Kass came to the houses, and, taking wit-
ness aside, stated that he could sell the houses to him; to
which witness replied that he had made his own negotia-
tions with Mr. Fred Schnider and did not want Mr. Kass
to "butt in". That Mr. Kass took Mr. Schnider aside and
talked with him, and becoming mad at Mr. Kass' conduct,
witness called his family and left. That Mr. Kass came to
see the witness at his store several days after, and told wit-
ness that he was leaving the employ of the Cafritz Company
and could sell him the houses and make a commission by
doing so, to which witness told Mr. Kass he could buy the
houses cheaper by dealing direct. That thereafter, on the
date the contract was signed, Mr. Schnider and Mr. Kass
came to witness's store; that they went up stairs to
27 the dining room, Mr. Spund being present, and came
to a price of \$30,500.00 for the two houses. That
there was no question raised about any commission nor was
there any discussion about the commission.

That Mr. Spund got a check and they went to Mr. Schnider's office. Discussion was had at the office about the building of the garages and some other improvements and then Mr. Schnider prepared the contract, the white paper contract, which was given to witness. At the same time Mr. Schnider prepared the blue paper contract, in which he left out the credit of \$7,000.00 and requested witness to sign the blue copy also, as it might help him sell some of the other houses, Mr. Schnider saying, If people know Jack Spund paid \$37,500.00 for the houses, they will know the price is right." Witness thereupon signed both contracts, the white one being delivered to him and gave Mr. Schnider check for \$3,500.00 payable to Kay-Schnider-Kay Company. That there was a delay in building the garages and the settlement of the purchase was not made for about a month and a half afterward. That settlement was made at District Title Company and that Mr. Schnider, Mr. George R. Linkins, and the witness were present. Mr. Kass was not present. No question of commissions was raised. Witness first learned that Mr. Kass claimed commissions when Mr. Kass came to his store about two or three months afterward and demanded a commission of \$1000.00; that witness told Mr. Kass that he owed him nothing and that Kass replied he would sue witness to which witness replied he, Kass, could go ahead and sue. Witness denied that he tendered Mr. Kass a check for \$500.00 or for any other sum. That he talked with Mr. Kass alone and that his wife, who was not then in the store always kept the check books and had always made out his checks. That witness thereafter got a letter from Mr. Louis Ottenberg, which letter was offered in evidence and was dated July 27th, 1926, making a formal demand upon witness on behalf of the plaintiff for commissions due of \$1,525.00 and that unless plaintiff's attorney heard from witness by August 3, 1926, he

28 was instructed to file suit.

On cross-examination witness stated that on the occasion of his first being introduced to Mr. Kass by his brother, Harry Spund, Mr. Kass had his own car and that Mr. Kass went in his car and witness and family went in witness' car to look at the houses Mr. Kass showed them. That it was not true that Mr. Kass left his car at witness' brother's house. That he did not tender any check to Mr.

Kass for \$500.00 and that when Mr. Kass tried to get witness to let him sell witness the houses he refused to do so.

On further cross-examination the witness in answer to a question as to what time he was talking about, in referring to the visit to witness's house he said "I don't know what you are talking about." "You don't know what I am talking about and I don't know what I am talking about myself."

On redirect examination the witness said he had not understood Mr. Ottenberg's question.

Thereupon, to further maintain the issues joined on his part, the defendant produced as a witness

Mrs. Mollie Spund, who testified that she is the wife of the defendant; that on a Sunday about a month or more before the houses were bought by her husband, they were out driving and seeing the houses went in and looked at them. There were her husband, the witness and their niece. They looked through 5109, but spoke to no one on that occasion but saw a man in there reading a newspaper. On a week-day during the same week, they went to the houses again, after closing the store. On that occasion her husband met Mr. Schnider, and her husband had a talk with Mr. Schnider but she did not hear the conversation. That the next day Mr. Schnider came to Mr. Spund's store, but witness did not hear the conversation. That the following Sunday, witness, her husband and niece went to her brother-in-law's home on 15th Street and Mr. Harry Spund was talking with a man on the side-walk. Witness heard her brother-in-law introduce the man, Mr. Kass, to her husband. She and her niece went into her brother-in-law's house and shortly were called out, introduced to Mr.

Kass and went out to look at some houses Mr. Kass
29 wanted to show them. They looked at houses on four or five streets but did not like them. Mr. Kass then left them and they went back to the Connecticut Ave. houses, where Mr. Spund talked again with Mr. Schnider, on which occasion she heard Mr. Schnider quote \$16,000.00 as a price for each of the two houses, which her husband afterwards bought. Mr. Kass came to the houses in about a half hour after they go there, took her husband aside and talked with him; thereafter she saw Mr. Kass take Mr. Schnider aside and talk with him; then her husband got

mad and calling the witness and niece, left the houses. Mr. Schnider called at their store by himself on one occasion, and on the day the contract was signed called with Mr. Kass. That witness and her husband took Mr. Schnider and Mr. Kass up to their dining room, where an agreement was reached to buy the houses at \$30,500.00. That there was no question of commissions raised during the conversation. That she got a blank check and together with Mr. Schnider, Mr. Kass, and her husband, went to Kay-Schnider-Kay Company. That after Mr. Schnider conferred with Mr. Kay, they went into Mr. Schnider's office and Mr. Schnider prepared the contract. She heard Mr. Schnider make the remark her husband testified to about wanting to have a contract which showed the price at \$37,500.00, and that her husband did sign said contract, in addition to the one given him. There was no question raised at the Kay-Schnider-Kay Company office about commissions. She drew the check for the deposit to Kay-Schnider-Kay Company for the \$3,500.00 and her husband signed same. She has always drawn checks for her husband, during all the time he has been in business.

On cross-examination the witness testified that Mr. Kass did not leave his automobile at her brother-in-law's house but went in his own automobile when showing other houses to them; that it was after dark on the week day evening on the occasion when she and her husband visited the houses the second time, but 5109, the sample house was lighted up.

30 Mr. Schnider came down stairs with some one else, and as Mr. Spund had asked if one of the owners was present, he was introduced to Mr. Schnider. She did not hear the conversation between her husband and Mr. Schnider, as they walked away to the back of the dining room.

Thereupon, to further maintain the issues on his part joined, the defendant called a witness

Edna V. Epstein, who testified that she was the niece of Mr. Spund, that she is now married and lives in Elmira, New York. That she was with her uncle and aunt when they looked at the houses on Connecticut Avenue, one Sunday. They went in the house, 5109, where her uncle and aunt now live. They spoke to no one, saw a man in there reading a newspaper, but after looking through went away.

Witness was with her uncle and aunt and children on another Sunday when they went to her Uncle Harry's house and saw her Uncle Harry introduce Mr. Jake Spund to a gentleman, whom she afterwards met. The gentleman was Mr. Kass. Her aunt and witness were called out of Mr. Harry Spund's house, and they went to look at some houses with Mr. Kass. That Mr. Kass left them and they went back to the houses on Connecticut Avenue, where she heard Mr. Schnider quote a price on 5109 and 5107 of \$32,000.00. Shortly after Mr. Schnider had quoted the price of \$32,000.00, Mr. Kass came in and she saw Mr. Kass get between her Uncle and Mr. Schnider and start talking to her uncle; she then saw Mr. Kass take Mr. Schnider aside and talk with him. Her uncle then became mad and took his wife and witness away from the houses.

On cross-examination the witness did not recall exactly what her uncle had said but it was to the effect that he did not like Mr. Kass to "butt in" upon his dealings with Mr. Schnider.

Thereupon, to further maintain the issues joined on his part, the defendant called as a witness

George R. Linkins, who testified in substance that he was a member of the bar of the Supreme Court of the District of Columbia; that he was president of Geo. W.

31 Linkins Company engaged in the general real estate business and that witness had been engaged in the real estate business in the District of Columbia for more than 20 years; that witness is a brother of counsel for Mr. Spund in this case; that witness was present, representing him, Mr. Spund, at the title Company, when settlement was made. That settlement was made under the contract written and printed on white paper, produced by the defendant. That Mr. Schnider and Mr. Spund were present and no question was raised or was any commission held out for anyone in the settlement. There was no cross-examination of this witness.

Thereupon defendant's counsel moved the Court to instruct the jury as follows, but the Court denied the same as hereinafter set forth.

Defendant's Instruction No. 1.

“The jury are instructed as a matter of law, upon all the evidence to find a verdict for the defendant.”

The grounds of the motion for this instruction were that the contract was signed by the principal signature of Garfield I. Kass as an individual; and as agent for the owner; that there was no assignment of the contract to the plaintiff; that all verbal negotiations merged in the written contract. But court denied the instruction, to which action of the Court in denying said instruction counsel for defendant duly excepted, and which exception was noted by the Court.

Thereupon counsel for the defendant moved the court to grant the following:

Defendant's Instruction No. 2.

“The jury are instructed that the plaintiff has the burden of proving by a preponderance of the evidence, that it was employed by the defendant, Spund, to purchase the property in question for him, and that it, the Cafritz Construction Company was the procuring cause of such purchase and if it find from the evidence that the Cafritz Construction Company was not so employed or that it was not the procuring cause of said purchase, even though some one else may have been, its verdict should be for the
32 defendant.”

But the court denied said instruction, without argument, to which action of the Court in refusing to grant said instruction, defendant's counsel duly excepted, which exception was noted by the Court.

Thereupon counsel for the defendant moved the Court to grant the following:

Defendant's Instruction No. 3.

“The jury are instructed as a matter of law that it appears from the uncontradicted evidence in the case that the contracts were drafted by Mr. Schnider of the Kay-Schnider-Kay Company and that it is a rule of law that there contracts must be construed most strictly against the Kay-Schnider-Kay Company.”

But the Court denied said instruction, to which action of the Court in refusing to grant said instruction, defendant's counsel duly excepted, which exception was noted by the Court.

Thereupon counsel for the defendant moved the Court to grant the following:

Defendant's Instruction No. 4.

“The jury are instructed as a matter of law that it appears from the uncontradicted evidence that Mr. Schnider, of the Kay-Schnider-Kay Company drafted the contracts in this case which were signed by Garfield I. Kass, agent for owner and that it is a rule of law that the contracts in this case must be construed most strictly against the Kay-Schnider-Kay Company, and if they find from the evidence that Garfield I. Kass acted in this transaction as agent for the Kay-Schnider-Kay Company, the verdict shall be for the Defendant.”

But the Court, without argument, denied said motion to so instruct the jury, to which action of the Court, the defendants' counsel duly excepted, which exception was noted by the Court.

Thereupon counsel for the defendant moved the Court to grant the following:

Defendant's Instruction No. 5.

33 “The jury are instructed as a matter of law that, from the uncontradicted evidence in this case it is proved that the two contracts were drafted by Mr. Schnider of the Kay-Schnider-Kay Company and as the law requires that the contracts must be construed most strictly against the Kay-Schnider-Kay Company, the words, ‘The price above is net’, which appears therein in the contract given the defendant, shall be construed against the Kay-Schnider-Kay Company and in favor of the defendant; that is that these words mean the price quoted was to be net to the defendant.”

But the court, without argument, denied said motion to so instruct the jury, to which action of the Court, the defend-

ant's counsel duly excepted, which exception was noted by the Court.

Thereupon defendant's counsel moved the Court to grant the following:

Defendant's Instruction No. 7.

"The jury are instructed that if they find from all the evidence that the defendant engaged the plaintiff to represent him, the jury will have to find what the contract actually was, and what service was rendered the defendant. The jury cannot speculate as to what the contract was or the value of the services rendered, and unless they find the contract made was for 5% of of the purchase price and that the services rendered were worth that sum, their verdict must be for the defendant."

But the Court without argument, denied said motion to so instruct the jury, to which action of the Court, the defendant's counsel duly excepted, which exception was noted by the Court.

Thereupon defendant's counsel moved the Court to grant the following:

Defendant's Instruction No. 8.

"The jury are instructed that it must find from the evidence the value of the services rendered the defendant and if it finds there was no value to said services to the defendant, then verdict shall be for the defendant."

34 But the court, without argument, denied said motion to so instruct the jury, to which action of the Court, the defendant's counsel excepted, which exception was noted by the Court.

Thereupon defendant's counsel moved the Court to grant the following:

Defendant's Instruction No. 9.

"The jury are instructed that as the written contract was not entered into by the plaintiff, but individually on the part of Garfield I. Kass, as the agent, there being no

assignment from Kass to the plaintiff, the plaintiff cannot recover, and its verdict should be for the defendant.”

But the Court, without argument, denied said motion to so instruct the jury, to which action of the Court, the defendant's counsel excepted, which exception was duly noted by the Court.

Thereupon, at the reconvening of Court, after the luncheon recess on May 15th, 1929, the Court permitted the plaintiff to reopen its case for rebuttal testimony.

Whereupon, the plaintiff to further maintain the issues on its part joined, produced as a witness in rebuttal

Fred Schnider, who testified in substance that on December 1, 1925, his corporation was a member of the Washington Real Estate Board and that the houses sold to the defendant were in a zone where the commission on sales were required to be 5%.

Thereupon the following question was asked the witness by counsel for the plaintiff:

Q. Did the Kay-Schnider-Kay Company sell any of the other houses in this building operation through other brokers and if so what commission was paid?

To which question defendant's counsel objected, on the ground that such evidence had no probative force in proving an express oral contract to pay the plaintiff a commission of 5% on the sales in this case. But the Court overruled said objection, to which action defendant's counsel duly excepted, which exception was noted by the Court.

35 Thereupon the witness testified that his corporation sold two houses in said row through the office of Douglass & Phillips and paid that office 5% (five) on the sale price.

This is the substance of all the testimony offered in the case.

Whereupon, after renewal of motion for instructions as hereinbefore set forth and upon reasons hereinbefore set forth, to which motions, the Court took the same action and granted the same exception, the Court charged the jury in substance as follows:

That the plaintiff had the burden of proof to maintain the issues on its part joined that the defendant agreed to pay it a commission of 5% on the purchase price of \$30,500.00; that there was a direct conflict in the testimony for the plaintiff and defendant in this regard; that it was the duty of the jury to decide which side was telling the truth; that if they found for the plaintiff, their verdict must be for \$1,525.00 and "with or without interest as you see fit"; that if the jury believed the defendant's testimony, then verdict should be for the defendant.

Whereupon defendant's counsel duly excepted to the refusal of the Court to instruct the jury as requested in Defendant's Instructions, Numberes 1, 2, 3, 4, 5, 7, 8, and 9, as hereinbefore set forth and upon the reasons hereinbefore set forth and further excepted to the instruction to the jury that if it found in favor of the plaintiff, its verdict must be for \$1,525.00, "with or without interest as you see fit", upon the ground that the declaration claimed interest and the jury might feel that the court was suggesting a compromise verdict should be rendered in favor of the plaintiff for \$1,525.00 without interest.

Thereupon the jury retired to consider its verdict and subsequently the jury reported its verdict in favor of the plaintiff for \$1,525.00 without interest.

The foregoing is the substance of all the testimony bearing upon the exception herein reserved on behalf of the defendant.

36 And thereupon and as all of said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the Court, before the jury retired to consider of its verdict, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the defendant may have his case reviewed on appeal, the defendant by his attorney, moves the Court to sign and seal this, his bill of exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is granted by the Court; and thereupon the defendants tenders this, his bill of exceptions, and requests the court to

sign and seal the same, which is accordingly done nunc pro tune this 21st day of October, A. D. 1929.

WILLIAM HITZ,
Associate Justice.

Approved:

CHAS. LINKINS,
Attorney for Defendant.
LOUIS OTTENBERG,
Attorney for Plaintiff.

(Here follow contracts, marked side folios 37 and 38.)

39 [Endorsed:] At Law. No. 73024. Cafritz Construction Co., a corporation, 14th & K Sts. N. W., Plaintiff, vs. Jacob Spund, 5109 Conn. Ave. N. W. Defendant. Defendant's bill of exceptions as agreed to and sealed by the Court. Charles Linkins, Attorney for the Defendant, Investment Bldg.

Endorsed on cover: District of Columbia Supreme Court. No. 5079. Jacob Spund, appellant, vs. Cafritz Construction Company, a corporation. Court of Appeals, District of Columbia. Filed Oct. 23, 1929. Henry W. Hodges, Clerk.

INVESTMENT BUILDING
18TH AND K STREETS N. W.

KAY SCHNIDER KAY CO.

PHONES. FRANKLIN 513 - 514

SALES - RENTS - LOANS - INSURANCE
WASHINGTON, D. C.

\$500.00

\$500.

WASHINGTON, D. C.

1/1/1925

Received of Jacob Spand
a deposit of Five Hundred Dollars, to be applied as a part payment in the purchase of premises, Lots 47 & 48
in Square 1902, together with the improvements thereon, known as No. 510 & 509
Connecticut Avenue District of Columbia, on the following terms of sale, to-wit:

PRICE OF PROPERTY thirty seven thousand five hundred Dollars (\$37,500),
the purchaser agreeing to pay twenty thousand five hundred Dollars (\$20,500) cash at the date
of conveyance, of which sum this deposit shall be a part.

The purchaser is to assume, give, place, or take title subject to a first deed of trust secured on said premises
of \$8,500 due Oct 2/25 with interest at the rate of 6 1/2 per cent per annum, payable
semi-annually - \$4,250 each house
These two houses having 55' front.

The balance of (\$19,000) deferred purchase money, to be secured by a deed of trust on said
premises, to be paid in monthly installments of \$190 or more, including interest at 6 1/2 % per annum

Title to be good of record and free of encumbrance except as aforesaid; otherwise deposit will be returned
to purchaser; but should the title upon examination prove defective, the seller shall not be liable for any damages
caused thereby other than the cost of examination of title, nor shall the Agent be liable for any cost or damages
whatever. Provided, however, that if upon examination, the title should be found defective, the seller shall have
the right at his expense to promptly remove the defect, and the time herein specified for full settlement shall thereby
be extended for the period necessary for such prompt legal action.

Examination of title, conveyancing, notarial charges and recording at the cost of the purchaser.

The seller is to execute the usual special warranty deed and attach necessary revenue stamps.

Taxes, interest, rents, insurance, water rent, etc., to be adjusted to date of transfer.

Special assessments for any work completed prior to date of this contract shall be paid by the seller.

Seller hereby agrees to give possession of property at time of settlement.

This sale is made subject to the existing tenancy of the present occupant of the premises, and of any
restrictive covenants of record.

Purchaser is required and agrees to make full settlement in accordance with above terms of sale within
15 days from date of acceptance by owner, as indicated thereon; otherwise the deposit will be forfeited,
it being agreed that said deposit, if forfeited, shall be retained by KAY-SCHNIDER-KAY CO. INC., as compen-
sation for services rendered, but forfeiture of deposit shall not relieve purchaser of responsibility to comply with
the within terms of sale. 2000 sq ft area to match brick of house, concrete flooring, two
garage, same to be on each house - (6) new stone bases. House to be completed prior to
settlement, also garage. 510 to be similar to sample. Assurances to be paid
by Kay-Schneider-Kay Co. 6 months in garage.

Clear is hereby given for \$5000. - Balance due \$19,000.00 Cash!
The price above is cash on the above two houses 510 & 509.

This contract, executed in triplicate, is made subject to the approval of owner, and contains the final and
entire agreement between the parties hereto, and shall not be bound by any terms, conditions, or representations
not herein recited.

Accepted:

Jacob Spand

Purchaser.

192

Kay-Schneider-Kay Co

Kay-Schneider

Owner.

By

Garfield Mass
Agents for owner.

Address

Phone

Address

Phone

Address

Phone

Address

Phone

BUILDERS OF
"HOMES OF COMFORT"

INVESTMENT BUILDING
17TH AND K STREETS N. W.



PHONES: FRANKLIN 513-514

SALES - RENTS - LOANS - INSURANCE
WASHINGTON, D. C.

~~\$500.00~~

\$3500.-

WASHINGTON, D. C.

Dec. 1, 1925

Received of

Jacob Spens

a deposit of Five Hundred Dollars, to be applied as a part payment in the purchase of premises, Lot 47, 18
in Square 1984, together with the improvements thereon, known as No. 5107-5109

Connecticut Avenue

District of Columbia, on the following terms of sale, to-wit:

PRICE OF PROPERTY, Thirty-five Thousand Five Hundred Dollars (\$35,000.-),

the purchaser agreeing to pay Twenty Thousand Five Hundred Dollars (\$20,500.-) cash at the date
of conveyance, of which sum this deposit shall be a part.

The purchaser is to assume, give, place, or take title subject to a first deed of trust secured on said premises
of \$8500.- due 2/1/26 with interest at the rate of 6 1/2 per cent per annum, payable
semi-annually - on each year.

The balance of (\$27,000.-) deferred purchase money, to be secured by a deed of trust on said
premises, to be paid in monthly installments of \$ or more, including interest at 6 per annum

Title to be good of record and free of encumbrance except as aforesaid; otherwise deposit will be returned
to purchaser; but should the title upon examination prove defective, the seller shall not be liable for any damages
caused thereby other than the cost of examination of title, nor shall the Agent be liable for any cost or damages
whatever. Provided, however, that if upon examination, the title should be found defective, the seller shall have
the right at his expense to promptly remove the defect, and the time herein specified for full settlement shall thereby
be extended for the period necessary for such prompt legal action.

Examination of title, conveyancing, notarial charges and recording at the cost of the purchaser.

The seller is to execute the usual special warranty deed and attach necessary revenue stamps.

Taxes, interest, rents, insurance, water rent, etc., to be adjusted to date of transfer.

Special assessments for any work completed prior to date of this contract shall be paid by the seller.

Seller hereby agrees to give possession of property at time of settlement.

This sale is made subject to the existing tenancy of the present occupant of the premises, and of any
restrictive covenants of record.

Purchaser is required and agrees to make full settlement in accordance with above terms of sale within
15 days from date of acceptance by owner, as indicated thereon; otherwise the deposit will be forfeited,
it being agreed that said deposit, if forfeited, shall be retained by KAY-SCHNIDER-KAY CO., INC., as compen-
sation for services rendered, but forfeiture of deposit shall not relieve purchaser of responsibility to comply with
the within terms of sale.

Two car garage to match face brick of house, concrete
flooring, ten room, same to be on each street in boxes in keeping with
rest of house. House to be completely new to settlement. Also garage
5107 - to be similar to sample. Assessments to be paid by
Kay-Schneider-Kay Co.
Electric light in each garage. The price work is not.

This contract, executed in triplicate, is made subject to the approval of owner, and contains the final and
entire agreement between the parties hereto, and shall not be bound by any terms, conditions, or representations
not herein recited.

KAY-SCHNIDER-KAY CO., INC.

By

Garfield J. Kass

Agents for owner.

Accepted:

Jacob Spens

Address

Phone

Address

Phone

Purchaser.

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Kay-Schneider-Kay Co
Fred Schneider

Address

Phone

Address

Phone

Owner.

I hereby authorize KAY-SCHNIDER-KAY CO., INC., my agents in the within contract of sale, to place
order for the examination of the title to the above described property and agree to pay cost of the same.

Purchaser.

WASHINGTON, D. C.

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I hereby agree to pay KAY-SCHNIDER-KAY CO., INC., my agents, in the within contract of sale, the
sum of \$ in consideration of services rendered by them. Said sum to be deducted from the
proceeds of the above sale.

Witness:

Owner.

(OVER)

FOR MR. JUSTICE GRONER

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

JAN 7 - 1930

Henry W. Hodges
Clark,

In the Court of Appeals
OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1929.

No. 5079.

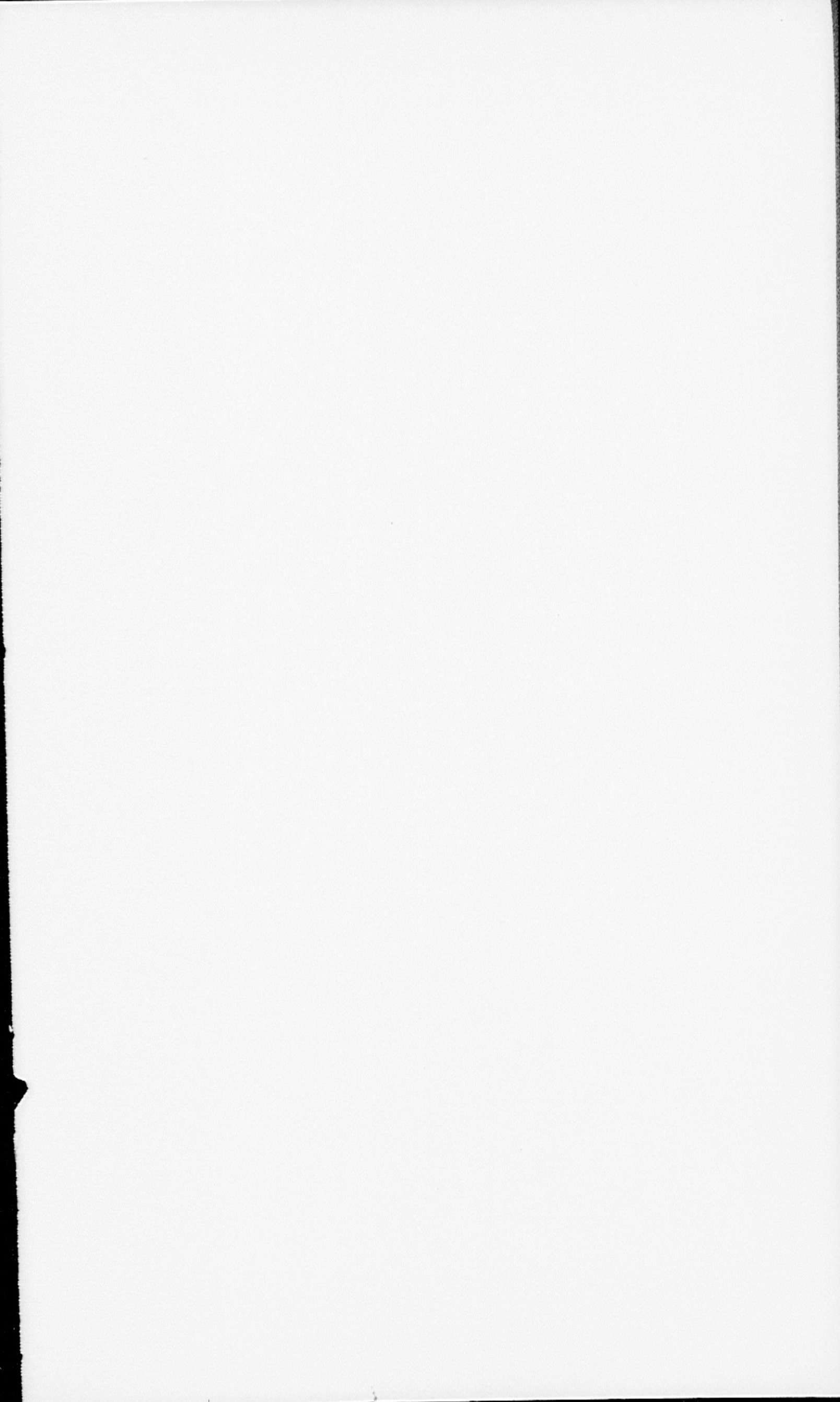
JACOB SPUND, APPELLANT

vs.

CAFRTZ CONSTRUCTION COMPANY,
A CORPORATION, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

→ CHARLES LINKINS,
Attorney for Appellant.



In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1929.

No. 5079.

JACOB SPUND, APPELLANT

vs.

CAFRITZ CONSTRUCTION COMPANY,
A CORPORATION, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

Statement of Case.

This appeal is based solely on the case made out by the appellee, plaintiff below and not on the case made out by the appellant, defendant below, for errors claimed to have been made by the trial court, including the refusal of instructions prayed for by appellant and the Court's instructions to the jury.

For the purposes of clearness the appellee will be referred to as plaintiff and the appellant will be referred to as the defendant, the positions they occupied in the court below.

There were three actors in the case, namely The Kay-Schnider-Kay Company, a corporation doing a general real estate business, which was the builder and owner of the houses involved in this litigation, the plaintiff, a corporation doing a general real estate

business and the defendant, who was the purchaser of the two houses, 5107 and 5109 Connecticut Avenue, two of a row of 15 houses built by the Kay-Schnider-Kay Company, which company will be hereinafter referred to as the seller.

Fred Schnider, who was a witness for the plaintiff, was the treasurer of the seller and acted for the seller throughout all the transactions referred to in the testimony. (Rec., p. 19-20.)

The other witness for the plaintiff was Garfield I. Kass, who was a salesman for the plaintiff during the transactions involved.

The houses were put on sale by the seller in October, 1925 and were listed with the plaintiff for sale, by the seller, previous to the purchase of two of them by the defendant, December 1, 1925. (Rec., pp. 16, 19, 20.) There were 15 houses in the row and there were two large signs in front of the houses advertising the sale prices as \$18,750 and \$17,950, which signs contained the name of the seller in large letters about twelve to fourteen inches high. (Rec., pp. 16, 19.) The seller knew that in listing the houses for sale with the plaintiff, it contracted to pay the plaintiff a 5% commission, if it effected a sale of any of them, for the seller's treasurer says these houses were in a zone which required the seller to pay a 5% commission on any sales made for it by other brokers, both the seller and the plaintiff at that time being members of the Washington Real Estate Board (Rec., p. 30). The houses had been on the market for three months and as the seller needed money, it was desirous of making a first sale to get the sale started. (Rec., p. 16.)

The defendant opened up negotiations with the seller for the purchase of the two houses the early part of November, 1925. (Rec., p. 31.)

Suffice it to say that the defendant's testimony

tended to show that he opened up negotiations with seller direct; that he refused to have any dealings with the witness, Kass, salesman for the plaintiff, and denied that he ever agreed to pay the plaintiff any commission on the deal, as representing him as buyer.

Plaintiff's testimony showed that the relationship of seller and broker, the *seller* to pay a commission to the plaintiff in event plaintiff made a sale, continued up until immediately before the contract of sale was executed. (Rec., pp. 16, 17.)

The real crux of the case involves the understanding had about the payment of commissions.

Keeping in mind that the seller had entered into a contract to pay plaintiff commissions if a sale was effected of any of the houses, before negotiations were opened with defendant, and that the seller knew its obligations in that regard, at best, the plaintiff's testimony showed only an *oral* agreement entered into between the defendant, as buyer, and the *seller*, for a shifting of the burden to pay commissions on the agreement already entered into by seller with plaintiff, from the seller to the defendant, as buyer.

This is shown by the questions addressed to the plaintiff's two witnesses by its attorney, as follows:

"Question by plaintiff's attorneys: Mr. Kass, just what was said *by the defendant and Mr. Schnider* about the question of the payment of commission if any, to the plaintiff, on that occasion?" (Rec., p. 17.)

Question put to Schnider, treasurer of seller, by plaintiff's attorney.

"Q. What was then said, if anything, about the commissions?" (Rec., p. 20.)

While both these questions were objected to, objection was overruled, and exception taken by de-

fendant, the first question brought out the following testimony from Kass, salesman of plaintiff:

“He, (Spund, defendant) then offered \$30,500.00 provided Kay-Schnider-Kay Company would build the two garages in the rear of the two houses and make certain other minor changes. Mr. Schnider then said that he would not accept \$30,500.00, build the two garages, make the minor changes and pay the real estate broker's commission. Thereupon Mr. Spund said he would take care of the commission; that in agreeing to accept \$30,500.00 *the defendant agreed with Mr. Schnider that he would stand for a five (5%) per cent commission.* (Rec., p. 17.)

The second question which was addressed to Schnider, treasurer of the seller brought out the following testimony from the seller's treasurer:

“Mr. Spund stated that Schnider had offered the two houses for \$32,500. He then offered \$30,500 for the two houses, provided Kay-Schnider-Kay Company would build two garages in the rear of the properties and make certain other minor changes. Mr. Schnider then said that he would not accept \$30,500.00, build the garages, make the minor changes and also pay the real estate broker's commission. Thereupon Mr. Spund said that he would take care of the commission.”

The understanding as to commissions, according to plaintiff's own testimony was had between the seller and the defendant, as buyer and was, at best, an oral agreement between the defendant and seller to assume the seller's obligation to pay the plaintiff's commissions due on the sale.

The first conversation as to the shifting of the burden to pay the commissions from the seller to the buyer, was had the day the contract was executed, about

lunch time in the dining room of the Spund home in Northeast Washington.

Immediately after the conversation, Mr. and Mrs. Spund and the two witnesses for the plaintiff, Kass and Schnider, left and went to the office of the seller, where the contract was prepared.

This contract, photostat copy of which is made part of the record and noted as "Side folio 37," was then drafted by Mr. Schnider, treasurer of the seller, on the forms of the seller. (Rec., pp. 18, 20.)

This contract contains the words, "The price above is net."

While the trial court, over the objection and exception of defendant, (Rec., p. 18) permitted the plaintiff's salesman, Kass, to testify as to what Mr. Schnider meant when he used these words, Kass's testimony as to why the words were employed by Schnider still further shows that the alleged understanding to stand for the obligation of the seller to the plaintiff, *was between the seller and buyer*, the defendant, and not between the plaintiff and defendant, for Kass testified as to the meaning of those words as follows:

"Mr. Schnider had said that owing to the credit of \$7,000.00 given the defendant on the purchase of \$37,500.00 and the other improvements to be made by the owner, Mr. Schnider had insisted upon the contracts being made on a net basis to the owner." (Rec., p. 18.)

The treasurer of the seller, Schnider, further testified as to the understanding he had with the defendant, as follows:

"Before the contract was signed, *he* had an understanding with Mr. Spund that Spund would pay the commission." (Rec., p. 20.)

After the contracts were drafted by Mr. Schnider, treasurer of the seller and on the forms of the seller,

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"Before the contract was signed, *he* had an understanding with Mr. Spund that Spund would pay the commission." (Rec., p. 20.)

After the contracts were drafted by Mr. Schnider, treasurer of the seller and on the forms of the seller,

Mr. Schnider read the contract to Mr. and Mrs. Spund, whereupon Kass, salesman for plaintiff, struck out the printed words "Kay-Schnider-Kay Co., Inc." from the place for the signature of the agent for the seller and signed *his own individual name* on the line above the printed words "agents for owner" and Mr. Spund signed on the line above the words "purchaser" and Mr. Schnider signed the name of "Kay-Schnider-Kay Co., Fred Schnider" above the word "owner," accepting the contract as purchaser and owner. (Rec., p. 18.)

It is here well to state that another photostat copy of a contract, on a different form than the real contract in the case, is made a part of the record and noted as "side folio 38." The only testimony about the reason for the execution of this second contract was given by the defendant and his wife, who explained that this contract was signed by the defendant at the special request of Mr. Schnider, so Mr. Schnider could show it to prospects for other houses in the row as the sale price being \$37,500.00. (Rec., pp. 23, 25.)

This second contract left out the credit of \$7,000.00, but it is significant that it differed from the real contract in that it contained a printed form of agreement for the payment of commissions, which could have been properly filled out by Schnider as to the understanding of the shifting of the burden to pay commissions from the seller to the defendant, had there been any such understanding.

Schnider, treasurer of the seller testifies about the settlement at the Title Company as follows:

"That settlement was made in the office of the District Title Insurance Company on January 28, 1926 and settlement was made on a basis of \$30,500.00, as the purchase price. There were present at the Title Company, other than the settlement clerk, Mr. Spund, Mr. George R. Linkins, representing Mr. Spund, and the witness.

(Schnider.) *That no commissions were held out in the settlement. That witness notified Mr. Kass of the settlement a day or two afterwards.*" (Rec., p. 21.)

In other words the plaintiff's position as taken by this witness is that the seller, which had created the obligation to pay plaintiff a commission on the sale of any of the houses it might effect before negotiations for the sale to the defendant were commenced, had, on the date the contract was executed, entered into an oral agreement that the defendant was to assume the seller's obligation, attended the settlement of the sale, allowed the defendant to pay the seller \$10,000.00 cash, in accordance with the contract and to assume two trusts of \$8,500.00 each, and did not at that time insist that the defendant keep the alleged agreement had with this witness to stand for the commissions. He got for his company all that was coming, before he notified his friend, Kass that the deal was closed.

The last clause of the contract, just above the individual signature of the salesman, Kass, is a most significant one. It is as follows:

"This contract, executed in triplicate, is made subject to the approval of owner, and contains the final and entire agreement between the parties hereto, and shall not be bound by any terms, conditions, or representations not herein recited."

It must be kept in mind that both Kass, salesman for plaintiff and Schnider, treasurer for seller, were experienced real estate men and had been associated together as salesmen for the plaintiff for some years, while the record is silent as to the defendant's knowledge of real estate purchases. (Rec., pp. 16, 19, 21.)

Assignment of Errors.

There are thirteen assignments of error, (Rec., pp. 13, 14) which are here urged, and which for the purposes of argument will be grouped into the following legal propositions, in their degree of importance, the least important being first considered.

1. The lower court erred in instructing the jury that if it found for the plaintiff, it should find for it in the sum of \$1,525, "*with or without interest as you see fit.*" Assignment of Error, No. 13. (Rec., p. 14.) Exception to Court's Charge. (Rec., p. 31.)

2. The lower court erred in permitting Schnider to testify in rebuttal that his company had paid Douglass and Phillips 5% commission on the sale of some of the other houses in the row, after the sale to defendant. Assignment of Error, No. 3. (Rec., p. 13.) Exception, (Rec., p. 30.)

3. The lower court erred in refusing defendant's instructions Nos. 2, 7 and 8. (Rec., pp. 27, 28.) Assignments of Error, Nos. 5, 9 and 10. (Rec., p. 13.)

4. The lower court erred in permitting plaintiff's witnesses to testify to alleged verbal negotiations had between the *seller* and defendant, before the written contract was prepared by the seller and executed. (Exceptions, Rec., pp. 17, 24.)

5. The lower court erred in permitting testimony to be offered by plaintiff explaining the meaning of the words used by the seller in the contract prepared by its treasurer, "The price above is net." (Exception, Rec., p. 18; Defendant's Instructions, Nos. 3, 4 and 5, Rec., pp. 27, 28; Assignments of Error, Nos. 2, 6, 7 and 8, Rec., p. 13.)

6. The court erred in not instructing the jury, on all the evidence, to return a verdict in favor of defendant. Assignments of Error, Nos. 1 and 12. (Rec., pp. 13, 14.)

ARGUMENT.

1. Both counts of declaration claimed interest from the date of the purchase contract, December 1, 1925. The plaintiff made no request for the charge that if the jury found for the plaintiff it could find for \$1,525.00, "with or without interest as you see fit." Nor had the plaintiff waived claim to the interest claimed. As was pointed out to the court at the time:

"the jury might feel that the court was suggesting a compromise verdict should be rendered in favor of plaintiff for \$1,525.00 without interest."

To say that the defendant was not prejudiced by this charge is best answered by the jury's verdict.

2. That the court erred in permitting plaintiff's witness, Schnider, on rebuttal to testify that his corporation, as seller, had paid the office of Douglass and Phillips 5% on the sales of other houses in the row, after the contract with the defendant, there can be little question, it is submitted. The court opened the case to allow this witness to testify on this point after argument of prayers and immediately before the case was submitted to the jury. There was no time to check up on this testimony, but when it was checked up it was found to be a misstatement. See affidavit of disinterested witness, filed in support of motion for new trial. (Rec., pp. 11, 12.) Such testimony was inadmissible, as claimed in the objection and exception, (Rec., p. 30), for it had no probative force to prove a contract claimed to have been had between plaintiff and defendant to pay plaintiff a commission of 5%.

3. The court erred in not granting defendant's instructions Nos. 2, 7 and 8 (Rec., pp. 27, 28). The first count of declaration declares on a special agreement; the second count is a money count, claiming

the reasonable value of plaintiff's services to defendant for making the purchase. These prayers should have been granted for they state the correct legal propositions under such a count. Both counts were submitted to the jury.

Du Perow *vs.* Groomes, 42 App. D. C., 287;
Moore and Hill *vs.* Brueninger, 34 App. D. C.,
557.

4. The court erred, first, in permitting the two witnesses for plaintiff, Kass and Schnider, to testify as to oral negotiations had between the *seller* and the defendant, buyer, as to the assuming by defendant of *seller's obligation* to pay commissions to plaintiff, which were alleged to have occurred before the written contract was entered into, and second, in refusing to so instruct the jury that these oral negotiations merged in the written contract. The whole testimony of the plaintiff shows that these oral negotiations were had before the contract was executed. They were between the seller and defendant, buyer; *not between the plaintiff and defendant*. The two real signatures to the contract were by the same parties.

These oral negotiations between the real parties merged in the written contract when it was entered into by seller and buyer.

Kinney *vs.* McNabb, 44 App. D. C., 340, at
343.

5. The court erred in permitting plaintiff to offer evidence to prove the meaning of the words used in the contract which was prepared by the seller on one of its forms, "The price above is net." To this the defendant objected and excepted. (Rec., p. 18.) Also the court erred in not granting defendant's instructions Nos. 3, 4 and 5. (Rec., pp. 27, 28.)

The *seller* made the agreement with defendant, according to plaintiff's testimony, for the shifting from the seller to the defendant, as buyer, of the seller's previously contracted engagement to pay commissions to the plaintiff. The alleged contract for the defendant to stand this obligation of seller's, was therefore between the two real parties to contract. The seller drew the contract, through its treasurer, on one of its printed forms. It is therefore a rule of law that under such circumstances, especially where a printed form of one of the parties is used, that the contract will be construed most strongly against the party drafting it and that if ambiguities appear that the meaning most favorable to the scrivener *will be leaned against*.

The rule is well stated in 13 Corpus Juris, page 545, as being:

"Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they will mean another thing to his advantage."

This court, in *Nocolopole vs, Love*, 39 App. D. C., 342, at 349, stated the rule to fit the facts in that case, as follows:

"In the case at bar, plaintiff prepared the lease, and though the language used in reserving to him the right to terminate the lease for the purpose of rebuilding is somewhat ambiguous, it will most reasonably admit of the interpretation we have given it, *especially in the light of the rule that where a contract will admit of two constructions, either of which is reasonable, the one most favorable to the grantee must be adopted*,

on the principle that a man's grant shall be construed most strongly against him." (*Italics ours.*)

See also:

Norman *vs.* Bradley, 9 Wall., 394, 407; 19 L. Ed., 757, at 761.

This rule is particularly applicable where the contract is on a printed form used by one of the parties, as in the case at bar.

Mt. Vernon Refrigerating Co. *vs.* Fred W. Wolfe Co., (C. C. A.), 188 Fed., 164, at 168;

Hardy *vs.* Ward, 150 N. C., 385; 64 S. E., 171;

Farmers Nat. Bank *vs.* Delaware Ins. Co. 83 Oh. St., 309, 94 N. E., 834;

Texas and Pac. R. Co. *vs.* Reiss, 183 U. S., 621, 626; 46 L. Ed., 358, at 360;

First Nat. Bank *vs.* Hartford Fire Ins. Co., 95 U. S., 673, 679; 24 L. Ed., 563, 565.

It must also be kept in mind that the form of seller's contract had the following printed provision which appeared just above the individual signature of the salesman, Kass:

"This contract, executed in triplicate, is made subject to the approval of owner, and contains the final and entire agreement between the parties hereto, and shall not be bound by any terms, conditions, or representations not herein recited."

6. The court erred in not granting defendant's instructions Nos. 1 and 12, to instruct the jury to find, on all the evidence, for the defendant.

The first count of plaintiff's declaration claims:

"That before, at and after the sale aforesaid said defendant did undertake, promise and agree with the plaintiff, acting by and through its representatives and agents, to pay the plaintiff

the usual real estate broker's commission in the District of Columbia, to wit, the sum of five per cent of said purchase price of \$30,500."

The second count, one of the money counts, claims:

" . . . for money payable by the defendant to the plaintiff for services rendered by the plaintiff for the defendant at his special instance and request in connection with and growing out of the sale to the defendant," of the houses in question.

There was no proof that the defendant ever had any agreement with plaintiff for the payment to it of commissions. True the witness, Kass, according to plaintiff's testimony, was present on both occasions when Schnider, treasurer of the seller, claims to have had the understanding with the defendant that the defendant would assume the seller's obligation to pay plaintiff commissions. But Kass was a mere salesman, at best, for the plaintiff and it is not shown that he had any authority to change the agreement made between the seller and plaintiff when the houses were listed with the plaintiff. In fact Kass makes no claim to such authority.

Be that as it may, however, the record shows clearly that the alleged oral agreement was between the buyer and seller and that agreement was concerning a previously contracted engagement on the part of seller to the plaintiff to pay commissions to the plaintiff. Had this been a suit by the seller against the defendant, buyer, for the keeping of this alleged oral contract to stand for the obligation of the seller, it would have been void under the Statute of Frauds (Code Sec. 1117). The statute could not here be pleaded, nor would it have been proper to make objection to the testimony given as to the oral contract, on that ground. Such testimony merely meant that the plaintiff had failed to prove that it had an agreement with defendant

that defendant would pay it commissions on his purchase.

Another point brought out in plaintiff's testimony should here be commented upon, and that is the construction placed upon the contract by the seller at the time of settlement. Schnider's testimony as to settlement (Rec., pp. 20, 21) is as follows:

"That settlement was made in the office of The District Title Insurance Company on January 28, 1926 and settlement was made on a basis of \$30,500.00; as the purchase price. There were present at the Title Company, other than the settlement clerk, Mr. Spund, Mr. George R. Linkins, representing Mr. Spund, and the witness. That no commissions were held out in the settlement. That witness notified Mr. Kass of the settlement a day or two afterwards."

Bearing in mind that the seller created an obligation on its part to pay plaintiff a commission in the first place; that the plaintiff's testimony, at best, shows an oral agreement between *seller* and *defendant* that defendant would assume the previously contracted engagement; that the contract was thereafter drafted by the *seller* on *one of seller's forms*, after these alleged understandings were had between *seller and defendant*; that no further understanding was claimed to have been had after the contract was executed; that in drafting the contract a white form was used, and in drafting the paper which was to be used by the seller to show to other and future prospects, a blue form was used, which had a printed form of agreement as to commissions, which should have suggested to these two experienced real estate men, Kass and Schnider, that any different understanding as to commissions should have properly been made the matter of some memorandum in writing; that Kass signed both the agree-

ment and other paper individually and not for his plaintiff-corporation; that both the contract and other paper contained the words, "The price above is net;" that the other paper contained the same significant clause to the effect that the contract contained the full agreement; that Schnider represented the seller in the negotiations for the sale; that he made the agreement with the defendant about shifting the burden for payment of commissions from the seller to the defendant; nevertheless he attended at the Title Company, made the settlement with the defendant on the contract, obtained \$10,000.00 in cash from the defendant for his concern, saw the defendant assume two trusts of \$8,500.00 each on the two houses, and stood by and said nothing about his alleged agreement as to commissions, knowing that no commissions were held out, and waited a day or two before he notified his friend that settlement was made. Certainly these facts show that the seller had construed the contract as meaning that the buyer, defendant, was not to pay any commission. *Waters vs. Kapp*, 34 App. D. C., 575.

Conclusion.

Wherein lies the security of a written contract, if a seller can obligate itself to pay commissions to plaintiff, draft the contract on one of its own forms, uses in that contract the words, "The price above is net," uses in that contract language which means that the contract contains the full agreement; thereafter attends at the time of settlement and accepts all benefit from the defendant for itself and sees the defendant part with a large sum of money and assume \$17,000.00 of obligations, at that time construing the contract as meaning that the defendant was not to pay any commission; and thereafter assists the plaintiff in an effort to shift the commission liability from the seller (itself) to the

buyer (defendent), despite the import of the written contract, by actively cooperating with the plaintiff in an effort to hold defendant to an alleged verbal promise made to the seller before the written agreement was executed that the defendant would assume the commission obligation of the seller, and this, upon a contract in writing which bears the *individual signature of the plaintiff's salesman*.

If there ever was reason for the application of the principles of estoppel, which really underlie the three rules: (1) that previous verbal negotiations merge in a written contract, (2) that a contract, or the use of ambiguous language in a contract, drafted by one of the parties, shall be construed most strongly against such party, and (3) that the construction placed upon a contract by one of the parties to it, has great, if not controlling, weight in its construction by the Court, the case at bar presents the reasoning for all these rules.

It is respectfully submitted that the judgment of the Court below should be reversed, with costs to appellant.

Respectfully submitted,

CHARLES LINKINS,

Attorney for Appellant.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

JAN 23 1930

Harry M. Hodges
CLERK.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1929.

No. 5079

JACOB SPUND, APPELLANT,

vs.

CAFRTZ CONSTRUCTION COMPANY, A CORPORA-
TION, APPELLEE.

BRIEF ON BEHALF OF APPELLEE.

LOUIS OTTENBERG,
Attorney for Appellee.



IN THE
Court of Appeals, District of Columbia.

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Statement of the Issue.

The issue in this case was clear and narrow. It was a simple question of fact, settled by the jury in favor of the plaintiff on "a direct conflict in the testimony for the plaintiff and defendant in this regard,"

as stated by the trial justice in his charge (Rec. 31).

The situation was this:

Plaintiff was a licensed real-estate broker. Kay-Schnider-Kay Co. were also in the real-estate business and were the owners and builders of certain houses on Connecticut Avenue northwest. After certain preliminary negotiations, Mr. Kass, a salesman in plaintiff's employment, and Mr. Schnider, of Kay-Schnider-Kay Co., called at defendant's house relative to the sale of two of the houses. Defendant offered to purchase on certain terms and at a certain price (Rec. 17, 20). Mr. Schnider refused to consider the offer until his associates approved and would submit the offer only if defendant would agree to pay a commission of 5 per cent as brokerage to plaintiff (Rec. 17, 20). Defendant agreed to pay the commission. Then defendant, his wife, Mr. Kass and Mr. Schnider went to the office of Kay-Schnider-Kay Co., and on the way Mr. Kass, then acting on behalf of the defendant, kept pressing Mr. Schnider to close the deal on defendant's terms—that is, at the price and upon the terms offered, the defendant paying the broker's commission (Rec. 20). At Mr. Schnider's office, a contract between Kay-Schnider-Kay Co. and the defendant was executed on the seller's printed form, the contract stating that "the price above is net," that is, on a net basis to the owner (Rec. 18), Mr. Schnider having had an understanding with Mr. Spund, the defendant, that the latter would pay the plaintiff the commission involved in the deal (Rec. 20). The deposit was made to and held by the owners, none of the deposit going to plain-

tiff (Rec. 18, 20, 23, 25). The transaction was settled, and thereafter plaintiff, acting through Mr. Kass, made demand on the defendant for the commission. Defendant offered to settle for \$500, which was refused (Rec. 18).

The defendant and his wife admitted that the conversation had taken place in their home and that they had signed the contracts in the office of Kay-Schnider-Kay Co., but denied that anything was said about commission (Rec. 22, 25).

On cross-examination, the defendant was asked to fix the time of a certain transaction about which he had been testifying, to which he replied to counsel: "I don't know what you are talking about; you don't know what I am talking about; I don't know what I am talking about myself" (Rec. 24).

The court's charge to the jury was as plain and clear as the issue. He said, in substance (Rec. 31):

"The plaintiff has the burden of proof to maintain the issues on its part joined that the defendant agreed to pay it a commission of 5% on the purchase price of \$30,500.00. There is a direct conflict in the testimony for the plaintiff and defendant in this regard. It is your duty to decide which side is telling the truth, and if you believe the plaintiff's witnesses, your verdict must be for \$1,525, with or without interest as you see fit. If you believe the defendant's testimony, then your verdict should be for the defendant."

The jury returned a verdict for \$1,525, without interest.

ARGUMENT.

Appellant divides his assignment of errors into six groups (Brief 8). They will be treated here in that manner.

1. As to the court's charge to the jury to the effect that if the verdict was for the plaintiff, the jury could allow interest on the claim or not allow it as the jury saw fit. In view of the fact that the jury did *not* allow interest, the defendant was benefited, not injured. There is, therefore, no merit to this assignment.

2. Appellant assigns as error the exercise by the court of its right to permit the plaintiff to reopen the case for certain rebuttal testimony (Rec. 30). The mode of conducting the trial and the order of proof are matters under the control of the trial court, and, unless sound discretion is clearly abused, the appellate court will not interfere.

Hardy *v.* Wise, 5 App. D. C., 108.

Olmstead *v.* Webb, 5 App. D. C., 38.

“According to the rule which prevails in federal jurisdictions the judge presiding at the trial ‘has a right, and, indeed, it is his duty to see that the facts of the case are brought intelligibly to the attention of the jury, and to what extent he will intervene for this end is a matter of discretion.’ New York Trans. Co. *v.* Garside, 157 Fed. 521, 524. See also Berwind-White Coal Mining Co. *v.* Firment, 170 Fed.

151, 153, and *Adler v. United States*, 182 Fed. 464, 472.”

Budd v. U. S., 48 App. D. C., 332.

The exception taken by the defendant at the trial was that the testimony offered in the rebuttal “had no probative force” (Rec. 30). That was for the jury to decide.

Colbert v. Anacostia & Potomac R. R. C., 41 App. D. C., 171, 177.

3. The court was justified in refusing defendant’s instructions Nos. 2, 7 and 8 for the reason that Nos. 2 and 7 were covered in the charge of the court, and No. 8 ignored the definite facts proven and the issue made. Defendant had agreed, as a part of his offer, to pay plaintiff a 5 per cent commission. Plaintiff, accepting defendant’s offer to pay and his employment, and acting in defendant’s behalf, secured the acceptance by the sellers of the terms of defendant’s offer to purchase. The agency, agreement to pay, the services rendered in performance of the agency and the consummation of the purchase were all proven. The eighth instruction ignores this, but picks out just one item for the jury’s consideration. This was clearly erroneous.

Travers v. U. S., 6 App. D. C., 450.

Anacostia, etc., R. R. Co. v. Klein, 8 App. D. C., 75.

Presbrey v. Thomas, 1 App. D. C., 171.

Gleeson v. Va. Mid. R. R. Co., 1 App. D. C., 185.

Bradford v. Nat. Ben. Assn., 26 App. D. C., 268.

Du Perow v. Groomes, 43 App. D. C., 580.

4 and 5. These two assignments will be treated together because the law applicable to one is applicable to the other. The substance of the contention of the appellant is that as the defendant and Kay-Schnider-Kay Company had entered into a written agreement for the purchase and sale of property, plaintiff, who was not a party to that agreement, was bound by its terms and could not offer proof of the defendant's oral agreement with plaintiff; and further could not show, as a piece of cumulative evidence, that in the sales contract the seller had declared the price was net—that is, that the seller was not to pay the commission.

The *oral* agreement was between this plaintiff and this defendant. The *written* agreement was between Kay-Schnider-Kay Co. and the defendant. Plaintiff was not a party to or connected with the terms of the written agreement. Even the deposit was paid to the seller (Rec. 18, 20, 23, 25). The verbal contract may be proved even though the parties to that contract had made a written contract at the same time touching the same subject if the verbal contract does not contradict or vary the writing.

10 R. C. L. 1019, Sec. 212, Tit. "Evidence."

Hersom *v.* Henderson, 21 N. H., 224.

The rule that parol testimony may not be given to contradict a written contract is applied only in suits between the parties to the instrument or their privies.

"The parties to a written instrument have made it the authentic memorial of their agree-

ment, and for them it speaks the whole truth upon the subject-matter. It does not apply to third persons, who are not precluded from proving the truth, however contradictory to the written statement of others. Strangers to the instrument, not having come into this agreement, are not bound by it, and may show that it does not disclose the very truth of the matter.”

10 R. C. L., 1020, Sec. 213, Tit. “Evidence.”

McMaster v. Ins. Co. of N. Am., 55 N. Y., 222; 14 Am. Rep., 239, 248.

See also:

17 L. R. A., 272, notes.

In *Sigua Iron Co. v. Greene*, 88 Fed., 207 (31 C. C. A. 477) (1898), the court, at page 216, says that “the true rule is aptly expressed by the Court of Appeals of this State in *Lee v. Adsit*, 37 N. Y., 78, as follows:

“ ‘The rule that parol evidence shall not be received to contradict or vary a contract which is in writing applies only in controversies between the parties, promisor and promisee in such contract. * * * The writing is not conclusive as between one of the contracting parties, and a third person. This doctrine is asserted in a multitude of authorities, but in many instances it is accompanied by remarks from which it might be contended that the privilege of explaining the written document was not accorded to him, who was a party to it, but only to his adversary. 1 Greenl. Ev. Sec. 279; *New Berlin v. Norwich*, 10 Johns. 230; *Evans v. Wells*, 22 Wend. 345. But it is not so confined.

According to Co. Litt. 352*a*, "every estoppel ought to be reciprocal that is to bind both parties, and this is the reason that regularly a stranger shall neither take advantage of or be bound by an estoppel." To this effect, see *Jewell v. Harrington*, 19 Wend. 472; *Sparrow v. Kingman*, 1 N. Y., 246. * * * In *Reynolds v. Magness*, 24 N. C., 30, after stating the general rule, and that it applies only as between the parties, and not to strangers, Judge Gaston says: "They (the strangers) are at liberty to show that the written instrument does not disclose the full and true character of the transaction. And if they be thus at liberty, when contending with a party to the transaction, he must be equally free when contending with them. Both must be bound by this (conventional law) or neither." " "

The Circuit Court of Appeals then quotes from *McMaster v. Insurance Co.*, 55 N. Y., 222, as follows:

"Third persons are not precluded from proving the truth, however contradictory to the written statements of others. Strangers to the instrument, not having come into this agreement, are not bound by it, and may show that it does not disclose the very truth of the matter. And as, in a contention between a party to an instrument and a stranger to it, the stranger may give testimony by parol differing from the contents of the instrument, so the party to it is not to be at a disadvantage with his opponent, and he, too, in such case, may give the same kind of testimony."

To the same effect see

Dempsey *v.* Kipp, 61 N. Y., 462.

Lowell Mfg. Co. *v.* Safeguard Fire Ins. Co., 88 N. Y., 591.

Barreda *v.* Silsbee, 21 How. (U. S.), 146-169.

In Chamberlayne's "Modern Law of Evidence", Vol. 5, Sect. 3550 (Parol Evidence Rule: Private Documents); Not Conclusive Against Strangers, the law is stated to be as follows:

"The parties to an agreement are the ones who are responsible for what is expressed by them in the writing. If it contains something not intended, or omits some terms which should have been inserted, they and their privies are, nevertheless bound thereby. The rule, however, does not extend further in its operation so as to include strangers to the agreement. The later will not be considered as bound or prejudiced by what may be contained within the four corners of the instrument. In their case the parol evidence does not apply, but they will be permitted to go outside of the writing and show the exact transaction, even though the evidence offered may contradict the terms expressed," citing long list of cases in the notes.

In Main *v.* Aukam, 12 App. D. C., 375-388 *et seq.*, this Court held:

"The principle is clearly laid down in 3 Stark. Ev. (Pt. 4) 1049, where it is said that 'although a presumption arises, in the absence of proof to the contrary, that the parties have expressed in writing the *whole* of their inten-

tion in respect of the subject-matter, and intended the written terms to operate as an agreement, yet, that presumption may be rebutted by express evidence that what was so written was intended as a mere memorandum of one part or branch only of a more general agreement, and was not intended to operate absolutely and unconditionally, or it may be shown *that a parol contract was made independently, wholly collateral to and distinct from a written one made at the same time*. In such cases, the parol evidence is used, not to *vary the terms* of the written instrument, but to show either that it is *inoperative* as an entire and independent agreement, or that it is collateral and irrelevant."

It is therefore respectfully contended that the proof of an agreement between plaintiff and defendant did not vary or contradict the agreement between defendant and Kay-Schnider-Kay Co.; that the latter agreement did not and was not intended to incorporate within its provisions the agreement of defendant to pay plaintiff's commission. The *oral* agreement was one thing between certain parties. The *written* agreement was a different thing between certain other parties. There was never any merger of the oral contract into the written contract. The words in the written contract, "The price above is net", demonstrates that the seller was giving effect to defendant's agreement to pay the commission; otherwise there was no reason at all for including that sentence. That provision taken in connection with the positive testimony of Kass and Schnider that the defendant agreed to pay

plaintiff the commission, and Schnider's statement (Rec. 30) that before the sales contract was signed it was clearly understood that Spund was to pay plaintiff the commission on the deal, makes its inclusion in the contract clear. Its admissibility, meaning and probative force are clear.

There is no merit to these assignments of error.

6. Appellant's last assignment is based upon the court's refusal to direct a verdict in favor of the defendant. In the light of the direct conflict in the testimony it is inconceivable how such a verdict could legally have been directed.

Chalvert *v.* Huston, 43 App. D. C., 77.

Milson *v.* Gerstenberg, 43 App. D. C., 165.

That there was an agreement by defendant to pay plaintiff the commission was a fact determined by the jury. Appellant's argument (Brief 14) is therefore predicated upon an erroneous premise, and his reference to the fact that "no commissions were held out in the settlement" at the title company is perfectly consistent with the issue found by the jury in plaintiff's favor. The commission was not to be held *out* of the settlement; Spund was to put that up *outside* of the settlement. That is why Kass, as plaintiff's agent, promptly after the settlement demanded the commission from the defendant, who recognized his liability therefor by offering to pay five hundred dollars, although he knew he owed and had agreed to pay fifteen hundred twenty-five dollars, the amount the jury returned in its verdict.

Conclusion.

The case as presented to the court is one of fact. The issues of fact were settled by the verdict of the jury. There was no error in the rulings of the trial Justice. It is therefore respectfully submitted that the judgment should be affirmed. All of which is

Respectfully submitted,

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Attorney for Appellee.

